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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GABRIEL IGNACIO SALAZAR, Appellant.	)	2 CA-CR 2010-0098 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900302

Honorable James L. Conlogue, Judge

VACATED IN PART; AFFIRMED IN PART

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H O W A R D, Chief Judge.

¶1 Following a one-day trial before an eight-person jury, appellant Gabriel Salazar was convicted in absentia of possession of marijuana for sale, transportation of marijuana for sale, fleeing from a law enforcement vehicle, and resisting arrest. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which were 9.25 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record thoroughly but found no arguable issue to raise on appeal. She asks that we search the record for fundamental error. Salazar has filed a supplemental brief raising various issues, none of which requires reversal. We requested additional briefing from the parties to address whether Salazar's convictions for possession and transportation of marijuana for sale violate double jeopardy. For the following reasons, we vacate Salazar's conviction and sentence for possession of marijuana for sale but otherwise affirm his convictions and sentences.

¶2 Viewing the evidence in the light most favorable to sustaining the verdicts, we find there was sufficient evidence to support the jury's findings of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). Accordingly, we reject Salazar's undeveloped contrary argument. When a police officer drove his marked patrol car behind Salazar's automobile, Salazar sped away in excess of the posted speed limit, did not stop after the officer activated his patrol car's emergency lights and siren, fled on foot after driving his vehicle into an alleyway, and struggled with the officer before being restrained and arrested. *See* A.R.S. §§ 13-2508(A)(1), 28-622.01, 28-624(C). During an

inventory search of Salazar's vehicle, the officer discovered two burlap bags—one in the back seat and the other in the trunk—each containing three parcels of marijuana weighing a combined total of 123.4 pounds and having a value between $43,000 and $55,000. *See* A.R.S. § 13-3405(A)(2), (4).

¶3 Salazar next argues the trial court erred by holding the trial in his absence, asserting he did not have "firm" notice of the trial date and was not warned the trial could proceed in his absence. *See* Ariz. R. Crim. P. 9.1; *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996) (defendant's voluntary absence may be inferred if "the defendant had personal knowledge of the time of the proceeding, his right to be present, and the warning that the proceeding would take place in his absence if he failed to appear"). Salazar's argument is unsupported by the record. He signed a notice explaining (1) the trial or any other proceeding could occur in his absence, (2) if he failed to attend a proceeding the trial court could infer his absence was voluntary, and (3) he might not receive notice of future proceedings. Salazar was present in court on November 23, 2009, when the court confirmed his trial date of January 26, 2010. On January 19, Salazar's attorney filed a motion to withdraw, asserting Salazar had failed to stay in contact with him and requesting a warrant be issued for Salazar's arrest and the trial date be vacated. At a hearing which Salazar did not attend, the court denied the motion to withdraw and again confirmed the trial date of January 26. Although Salazar asserts his counsel's motion created "uncertainty" as to the trial date, the trial date was never changed and Salazar identifies nothing in the record suggesting he reasonably

could have believed his trial would not occur as scheduled. The notice Salazar received was sufficient, and the court did not err in holding the trial in Salazar's absence.

¶4 Salazar next asserts he was entitled to be tried before a twelve-person jury instead of before an eight-person jury because he could have received a maximum prison sentence of thirty years. *See* Ariz. Const. art. II, § 23; A.R.S. § 21-102(A). But our supreme court has determined that, even if the state could have sought a sentence of thirty years or more, a defendant cannot be given such a sentence once an eight-person jury begins deliberations, and thus no error occurs when the defendant's guilt is decided by an eight-person jury and the defendant is sentenced to a prison term of less than thirty years. *State v. Soliz*, 223 Ariz. 116, ¶¶ 2, 3, 18, 219 P.3d 1045, 1046, 1049 (2009). Because Salazar was sentenced to a prison term of less than thirty years, no error occurred even assuming the state could have sought a sentence of thirty years or more.

¶5 Salazar additionally contends several of the trial court's jury instructions violated the Sixth and Fourteenth Amendments to the United States Constitution, specifically challenging the "instructions on inventory search[,] . . . [the] value of drugs[,] . . . [and] not to consider punishment." It is not clear to which instructions Salazar refers. His supporting citations, apparently to the trial transcript, do not direct us to the jury instructions or any other directions the court gave the jury. And we find no instructions addressing inventory searches or the value of drugs. Having reviewed the instructions given, we find they properly stated the law.[1]

[1]To the extent that Salazar suggests evidence recovered from the inventory search and evidence of the value of drugs recovered should not have been admitted, he is

¶6 The trial court did instruct the jury that it "must not consider the possible punishment when deciding on [Salazar's] guilt; punishment is left to the judge." Relying on *Blakely v. Washington*, 542 U.S. 296 (2004), Salazar asserts that instruction was incorrect because *Blakely* "requires the . . . jury [to] be informed as a part of the trial and as an element, the punishment." Salazar misreads *Blakely*, which states only that a jury must in certain circumstances determine factual questions relevant to punishment. 542 U.S. at 301-02. The Supreme Court did not suggest a jury should decide a defendant's punishment or that it should consider possible punishment in deciding the defendant's guilt. *See id.* "In Arizona, the trial court, not the jury, determines matters of punishment. The jury's function is to determine the guilt or innocence of a party without consideration of the possible sentence." *State v. Allie*, 147 Ariz. 320, 326, 710 P.2d 430, 436 (1985). We therefore find no error in the court's instruction. *See id.* (appropriate to instruct jury to not consider punishment).

¶7 Finally, we agree with Salazar and the state that his conviction for possession of marijuana for sale violates double jeopardy. Under the facts of this case, that crime is a lesser-included offense of transportation of marijuana for sale because his convictions of possession and transportation were based on the same conduct. *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 10, 21, 965 P.2d 94, 96-97, 99 (App. 1998); *see*

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mistaken. *See State v. Organ*, 225 Ariz. 43, ¶ 20, 234 P.3d 611, 616 (App. 2010) ("Inventory searches are a well-defined community caretaking exception to the probable cause and warrant requirements of the Fourth Amendment."); *State v. Fornof*, 218 Ariz. 74, ¶¶ 20-21, 179 P.3d 954, 959-60 (App. 2008) (opinion testimony whether quantity of drugs was for sale proper, including testimony of "street value").

also State v. Cheramie, 218 Ariz. 447, ¶ 12, 189 P.3d 374, 376 (2008) (approving of analysis in *Chabolla-Hinojosa*). We therefore vacate his conviction and sentence for possession of marijuana for sale. *See Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d at 99; *see also State v. Musgrove*, 223 Ariz. 164, ¶ 10, 221 P.3d 43, 46 (App. 2009) (double jeopardy violation fundamental error).

¶8 Salazar's remaining sentences were within the prescribed statutory range and were imposed lawfully. *See* A.R.S. §§ 13-703(B), (I); 13-2508(B); 13-3405(A)(4), (B)(11); 28-622.01. Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error. For the reasons given, we vacate his conviction and sentence for possession of marijuana for sale. We find no other fundamental error and, having rejected the claims Salazar raised in his supplemental brief, affirm his remaining convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge